INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	8
Conclusion	14

CITATIONS

Cases:

Alford v. *United States*, 282 U.S. 687 11

Ferguson v. *United States*, 375 U.S. 962 11

Mitchell v. *United States*, 259 F. 2d 787, certiorari denied, 358 U.S. 850 8

Morgan v. *United States*, 159 F. 2d 85 8

Parr v. *United States*, 363 U.S. 370 10

Stearn v. *United States*, 18 F. 2d 465, certiorari denied, 275 U.S. 539 9

United States v. *Crosby*, 294 F. 2d 928, certiorari denied, 368 U.S. 984 9

United States v. *Kyle*, 257 F. 2d 559, certiorari denied, 358 U.S. 927 9

Statutes:

18 U.S.C. 1341 2

18 U.S.C. 4208(a)(2) 2

Miscellaneous:

F.R. Crim. P.:

Rule 12

Rule 52(b) 12

739-146—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 215

PAUL L. TEMPLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 1037–1040) is reported at 330 F. 2d 724.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1964 (R. 1041), and a petition for rehearing was denied on May 28, 1964 (R. 1042–1052). The petition for a writ of certiorari was filed on June 25, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, who was represented by counsel of his own choice, was denied his right to assistance of counsel under the Sixth Amendment.

2. Whether the evidence showed that letters soliciting proxy votes of stockholders were mailed for the purpose of executing the scheme to defraud described in the indictment.

3. Whether in the trial of three defendants who each had his own attorney, the court improperly restricted the right of cross-examination to avoid repetition.

4. Whether the court erred in its instructions to the jury.

STATEMENT

Petitioner and his co-defendants, Bishop and Miss Woodall, were charged in an indictment returned in the United States District Court for the Northern District of Georgia with using the mails to defraud in violation of 18 U.S.C. 1341. The substance of the fraudulent scheme charged was that the defendants obtained financial control of the Georgia Casualty and Surety Company (hereinafter called Georgia Casualty) by using the corporation's own money to buy out majority stockholders; that false representations were made as to a purported merger between Georgia Casualty and Eagle Fire Insurance Company; that the mails were used to send proxy cards to minority stockholders for their votes on this merger; and that the defendants diverted Georgia Casualty's funds into accounts under their own control (R. 3–16). Petitioner was the only defendant convicted, the jury finding him guilty on counts 8, 10, 11, 12, 13, and 14 (R. 1025). Petitioner was sentenced to imprisonment for two years under 18 U.S.C. 4208(a)(2), to be eligible for parole at such time as the Parole Board might determine (R.

1033–1034). On appeal, the conviction was affirmed (R. 44–45, 1041).

The evidence adduced at the trial may be summarized as follows:

In 1959 Mr. Dominey, Sr., and Dilbeck, owners of a majority of the stock of Georgia Casualty, located at Atlanta, Georgia, had conversations and correspondence with petitioner, a Chicago insurance broker, regarding a possible sale of Georgia Casualty to one of petitioner's clients (R. 56, 57, 193, 213, 769). In December 1959 petitioner stated that he had a client, Investors Finance and Thrift Company, with assets of $28,000,000, which was interested in buying Georgia Casualty and merging it with another company. After negotiations, a proposed contract was drawn up between the Thrift Corporation of America and the Investors Finance and Thrift Corporation as purchasers, and D. D. Dominey and J. Austin Dilbeck, as sellers, whereby the majority of Georgia Casualty stock was to be sold for approximately $530,000 (U.S. Ex. 1) and at the same time petitioner was to purchase $950,000 in unissued stock of Georgia Casualty (R. 62–63, 194–195). Petitioner said that he planned to merge Georgia Casualty with Eagle Fire Insurance Company, which he claimed to control (R. 82, 208–209, 252, 785).[1]

In January petitioner stated that he wanted the name of the Investors Finance and Thrift Corpora-

[1] The president of Eagle Fire Insurance Company testified that he attended all of the board of directors meetings of this company, and that the matter of a proposed merger between Eagle and Georgia Casualty had never been brought up at any of these meetings (R. 184–185).

tion stricken from the contract so that he could avoid refiling an application with the Securities and Exchange Commission for the sale of that company's stock in a separate transaction (R. 195–196). Petitioner showed to the sellers a letter signed by Mr. Hogan of Investors Finance and Thrift Corporation stating that this company was furnishing $2,700,000 in financing for the merger of Georgia Casualty and Eagle Fire Insurance Company (R. 67–68, 166, 196).[2]

On January 18, 1960, petitioner and his co-defendants were in Atlanta when the Georgia Casualty board of directors met to close the deal. The board agreed to deletion of the name of Investors Finance and Thrift Corporation from the contract in view of the fact that the buyers were purporting to put about $1,400,000 of their own money into the venture (through the purchase of majority and unissued stock) (R. 197–198). The old board of directors resigned and new directors (including Bishop and Miss Woodall), whose names had been furnished by petitioner, were elected (R. 169, 198). Petitioner showed to Mr. Dominey, Sr., and Dilbeck a check for $950,000 for the purchase of 190,000 shares of Georgia Casualty at $5 per share. Petitioner did not, however, deposit the $950,000 check in Georgia Casualty's account (R. 199).

[2] Mr. Hogan, a stockholder in Investors Finance and Thrift Corporation, denied that he had made a commitment, either personally or on behalf of the corporation, to back the purchase of Georgia Casualty (R. 391–392). The president of Investors also testified that at no time in 1959 or 1960 did the corporation guarantee to finance any individual or company in the purchase of Georgia Casualty stock (R. 408).

On that same day (January 18, 1960) Miss Woodall obtained from Mr. Hutcheson, the treasurer of Georgia Casualty, three blank Georgia Casualty checks which she said were necessary in the process of the merger with Eagle Fire Insurance Company (R. 520, 522–523, 525). Two of these checks were used to make a deposit of $700,000 in the checking account of Thrift Corporation (U.S. Exs. 23, 95, 96; R. 342, 524), which was sufficient to cover the approximately $530,000 paid to Domiiney, Sr., and Dilbeck for their Georgia Casualty stock. In addition to the $530,000 withdrawal petitioner withdrew $100,000 to be used to purchase cashiers' checks (U.S. Exs. 31, 50; R. 303, 304, 846) which were then deposited in various accounts in the Chicago area under petitioner's name or control. Petitioner withdrew an additional $23,745.24 (U.S. Ex. 51) with which he purchased numerous cashiers' checks for his personal use (U.S. Exs. 31, 37 through 48; R. 295, 297–299, 303). On January 19, 1960, petitioner had Georgia Casualty issue a check which he cashed in the amount of $1,388.27 to reimburse the new directors for their expenses in coming to Atlanta for the directors meeting on January 18, 1960. No such meeting was held (R. 856–857, 169, 385, 410–411, 415–416, 419).

Upon instructions from petitioner and Miss Woodall Mr. Domiiney, Jr., prepared a form letter to all stockholders, on the proposed merger between Georgia Casualty and Eagle Fire Insurance Company. The letter and a proxy card were mailed to each stockholder (R. 586–588, 798, 903). The mailings on January 20, 1960, of this form letter and proxy were the

basis of the counts on which petitioner was convicted (R. 616–617, 634–635, 629–630, 604–605, 642–643, 611–612).

During the week following January 18, 1960, Mr. Davis, Vice-President of the First National Bank in Atlanta, had occasion to examine the checking accounts of Georgia Casualty and Thrift Corporation of America. He found that the Georgia Casualty account had dwindled from $836,031.47 to $9,362.48; that the withdrawals had been transferred to Thrift Corporation; and that no deposits had been made in the Thrift account except the funds which came from Georgia Casualty. He further found that the $700,000 deposit in the Thrift account was money which had come from Georgia Casualty, and that no $950,000 deposit had made to the account of either Georgia Casualty or the Thrift Corporation (R. 341–342). When Mr. Dominey, Sr., learned petitioner had merely transferred funds from Georgia Casualty to Thrift Corporation and had paid off Dilbeck and him with Georgia Casualty's own money, he telephoned petitioner and stated that petitioner had better come to Atlanta again to "make this right" (R. 205–206).

On January 25, 1960, when petitioner arrived in Atlanta he withdrew numerous stocks from the safe deposit box of Georgia Casualty and took them to the First National Bank to sell them. The bank decided that it could not guarantee the signatures of petitioner and Miss Woodall on the stocks and returned them to Georgia Casualty (R. 337, 338, 340,

312–313, 858–859). Petitioner testified that he intended to sell these stocks in order to acquire sufficient funds to purchase the majority stock of Eagle Fire Insurance Company (R. 858, 859). Petitioner was arrested on January 26, 1960 (R. 145).

Walle, the supervisor of the accounting operations for Investors Finance and Thrift Corporation, testified for the defense that petitioner had brought to him 20 mergers which were effected and involved more than $65,000,000 (R. 718, 725). Walle testified that if petitioner had requested the financing of a merger of Georgia Casualty and the Eagle Fire Insurance Company, he would have helped him (R. 728–729). Walle admitted that he was not an elected officer of Investors Finance and that any question of financing a merger would have required approval by the board of directors (R. 729).

Petitioner testified on his own behalf that he acted in good faith and intended to effect the merger between Georgia Casualty and Eagle Fire Insurance Company, and that if he had had more time he could have done so, in view of his personal assets, his credit with Walle, and permanent financing which he had arranged with two investment banking firms (R. 819). On cross-examination, petitioner admitted a previous mail fraud conviction in 1951 (R. 863-864). The court instructed the jury that evidence as to this conviction was not admissible upon the question of petitioner's guilt, but solely for consideration by the jury in determining what weight and credit would be given to petitioner's testimony (R. 864).

ARGUMENT

1. There is no basis for petitioner's contention (Pet. 20–32) that he did not have the assistance of counsel to which he was entitled under the Sixth Amendment. Petitioner employed counsel of his own choice who had served more than 20 years as a prosecutor, had prosecuted numerous cases for the United States Attorney's office, had practiced law for 45 years and had previous judicial experience (R. 955, 960, 970). Although an accused is denied effective asistance of counsel if his counsel's conduct is so incompetent as to deprive him of a trial in any real sense and to make the trial a mockery or a farce (see *Mitchell* v. *United States*, 259 F. 2d 787, 793 (C.A. D.C.), certiorari denied, 358 U.S. 850), the record does not disclose such a situation here. Petitioner's counsel defended him as well as could be expected since the facts in the case were favorable to the government. Even though in some instances objections not made might have been sustained, many attorneys consider it sound strategy not to object to all inadmissible evidence but only to what appears extremely damaging and prejudicial.

a. There was no reason for petitioner's counsel to file a motion to dismiss the indictment on the ground that it was duplicitous in alleging that the defendants, "individually" and "aided and abetted by each other," devised the scheme to defraud (see Pet. 21–23). In *Morgan* v. *United States*, 159 F. 2d 85 (C.A. 10), upon which petitioner relies (Pet. 22), the indictment charged the defendant with "aiding and assisting" in the commission of an offense, but did not allege for whom the defendant was acting or that the

name of such person was unknown. The situation is different in the instant case, where the three defendants were known and named in the indictment as principals. Moreover, the allegation that they aided and abetted each other was unnecessary, since they were charged with committing the crime itself.

b. Petitioner complains (Pet. 26–31) that his counsel failed to object to the introduction in evidence of a few checks drawn on the Thrift Corporation account which were used to make good certain of petitioner's insufficient fund checks and other debts for personal items. This evidence was properly admissible to show petitioner's motive and intent in diverting Georgia Casualty's money to his own personal use, rather than to effect the proposed merger of Georgia Casualty with Eagle Fire Insurance Company. See *United States* v. *Crosby*, 294 F. 2d 928, 946–947 (C.A. 2), certiorari denied, 368 U.S. 984; *United States* v. *Kyle*, 257 F. 2d 559, 564 (C.A. 2), certiorari denied, 358 U.S. 927; *Stearn* v. *United States*, 18 F. 2d 465, 467 (C.A. 4), certiorari denied, 275 U.S. 539. Petitioner's counsel in closing argument tried to explain the insufficient fund checks by referring to them as "little checks" and intimating that it was natural for a person's account to be overdrawn occasionally (R. 967–968). Since defense counsel had referred to this matter, he had no basis for objecting when the government attorney attempted to refute his argument (R. 994–995).[3]

[3] The other indications of counsel's incompetence to which petitioner refers are clearly trivial.

2. Contrary to petitioner's contention (Pet. 32–34), the letters and proxy cards, relating to the proposed merger of Georgia Casualty and Eagle Fire Insurance Company and mentioned in counts 8 and 10 through 14 upon which petitioner was convicted, were mailed for the purpose of executing the scheme to defraud described in the indictment. The approval by the stockholders of the proposed merger was a necessary step in consummation of the fraudulent scheme. In soliciting the proxies petitioner intended to lead the minority stockholders to believe that a legitimate merger would eventually be completed, while he meanwhile proceeded to take control of Georgia Casualty assets. At the time the mailings occurred on January 20, 1960, petitioner had not yet obtained all of Georgia Casualty's ready assets. It was not until January 25, 1960, that petitioner took Georgia Casualty's stocks from the corporation's safe deposit box and made the unsuccessful attempt to sell them at the First National Bank. It is thus apparent that the scheme was a continuing one, and the letters mailed to the stockholders were an integral step in its execution.

Parr v. *United States*, 363 U.S. 370, in which this Court stated that the "factual situation is unique" (*id.* at 391), is not in point. In *Parr* the state law required the mailings (school tax statements) even if there had been no scheme to defraud and there was no allegation or evidence that the content of the mailings was affected by the scheme. In the instant case, although state law required mailings of proxy notices to effect a merger of corporations, there was no valid

merger and the alleged merger was part of the scheme to defraud. Thus, the entire purpose and content of the mailing related to the scheme to defraud.

3. There was no error in the trial court's ruling that the cross-examination in chief be conducted by one of the three defense attorneys, with the other two having the right to ask such special questions as might relate to their clients (see Pet. 34–39). The judge, in announcing that he did not want three general cross-examinations, stated: "I want each one of you to have a full opportunity to cross examine the witness with respect to any material matter, but I just don't want the cross examination repeated" (R. 96). This reasonable ruling as to the scope of the cross-examination was a matter well within the trial court's discretion. See *Alford* v. *United States*, 282 U.S. 687, 694.

There is nothing in the record to show that petitioner's counsel was improperly refused a request for cross-examination or was restricted in the cross-examination undertaken. He conducted comprehensive cross-examinations of the two principal government witnesses, Dilbeck (R. 177–183) and Mr. Dominey, Sr. (R. 242–274), and cross-examined numerous other witnesses (*e.g.*, R. 310–311, 343–351, 385–390, 392–401, 411–414, 416–418, 420–422, 431–432, 457–458, 477–479, 486–487, 490–491, 511–512, 515–516, 537–546, 565–567, 571–579, 607–609, 612–614, 636–639, 643–646, 663–666). Since petitioner's attorney was permitted cross-examination, the situation in the instant case is entirely different from that in *Ferguson* v. *United States*, 375 U.S. 962, where there was an

absolute restriction that only one of two defense counsel would be allowed to question each prosecution witness on cross-examination.[4]

In any event, petitioner made no objection to the procedure concerning cross-examination at the trial. At the very least, even if this procedure were in some way erroneous, *it did not* constitute such plain and substantial error that it might be raised for the first time on appeal. See Rule 52(b), F.R. Crim. P.

4. Petitioner's counsel stated that he had no objection to "any language of the charge given" (R. 1017). Since there was no objection to the court's charge it is too late for petitioner to raise objections on appeal. Rule 30, F.R. Crim. P. In any event, petitioner's present objections (Pet. 39–46) are without substance.

a. Petitioner contends that part of the charge (R. 1011–1012) allowed a finding of guilt on the basis of actions and statements by persons not connected with the defendants. However, petitioner omits the two preceding paragraphs of the charge (R. 1011) and the three following paragraphs (R. 1012–1013) clearly instructing the jury to consider only the actions and

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[4] Petitioner mainly objects to the limitation on his cross-examination of Mr. Dominey, Jr. There was, however, little necessity for petitioner's counsel to cross-examine this witness since he had already been cross-examined by the attorneys for the other defendants. The principal purpose of this witness's testimony was to show that the letters and proxy cards mailed to stockholders had been prepared by him under the direction of petitioner and Miss Woodall—a matter as to which there was no dispute. Both petitioner and Miss Woodall testified that the documents were prepared at petitioner's direction (R. 798, 903).

statements of persons connected in a common plan with the defendants. This charge, taken as a whole, was clearly correct. The use of the phrase "some common plan or arrangement" did not permit the jury to consider a scheme not charged in the indictment, since the court expressly charged that the "defendants are not on trial for any act or conduct not alleged in the indictment" (R. 1013).

b. Petitioner argues that the court, by instructing that the mailing counts charged that the defendants "did cause [mail] to be placed in an authorized depository for mail matter * * *" (R. 1002), failed to require a finding of wilfulness as charged in the indictment. In fact, however, the judge instructed (R. 1005):

> You will note that the acts charged in the indictment allege that they were done wilfully. An act is done wilfully if done voluntarily and purposely, with the specific intent to do what the law forbids; that is to say, with evil motive or bad purpose, either to disobey or disregard the law.

The court also charged that the government had the burden of "proving the case set out in the indictment in every material part, beyond a reasonable doubt * * *" (R. 1003–1004). It is clear from the charge as a whole that the jury, in order to find petitioner guilty on the mailing counts, was required to find that he had wilfully caused the mailings as charged in the indictment.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

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